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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH GABRIEL HORSLEY,

Defendant and Appellant.

C058439

(Super. Ct. No.
07F09616)

Based on the actions of defendant Kenneth Horsley during a California Highway Patrol (CHP) pursuit of his fleeing vehicle, jurors convicted him on ten of eleven counts involving a mélange of offenses (acquitting him only of attempted murder of a peace officer), sustained two firearm enhancements and, in a bifurcated proceeding, sustained recidivist enhancements. He was sentenced to state prison. The nature of his appeal does not require us to enumerate the convictions or to outline the sentences imposed.

Defendant contends that (1) the trial court erred in allowing a CHP officer to give his opinion about whether muzzle flashes and

gunshot sounds indicated that defendant was aiming at the officer when firing a gun from the window of defendant's vehicle, (2) one conviction must be reversed as necessarily included in another, and (3) defendant is entitled to two more days of custody credit. The People concede the latter two contentions. We shall reverse the lesser included offense, modify the judgment to give defendant an additional two days of presentence custody credit, and otherwise affirm the judgment.

DISCUSSION

I

A

Before trial, the court held a hearing to determine whether the CHP officer could testify to his conclusion that defendant was firing at him "[b]ased on the direction of the flashes and the noise." Defense counsel had argued that such a conclusion should be excluded as expert testimony lacking any scientific basis.

At the hearing, the officer testified about his six years of service in the United States Marine Corps and his experience as a firearms instructor at the CHP academy. During his military service as an infantryman in combat, he was regularly around firearms and often found himself downrange from people who were shooting at him. Regarding the shooting in this case, the officer testified that as he was maneuvering his patrol car to ram the left rear bumper of defendant's van to cause it to spin and stop, the windshield of the patrol car was about five feet from the driver's window of defendant's van. At this point, the officer heard "several shots in quick succession"

and saw the "muzzle flash." Based on the sound of the gunshots and the "spherical-shaped muzzle flash with a distinct black spot in the center," the officer concluded the gunfire was "pointed at [his] direction." The officer acknowledged that he did not see either defendant's hand or the gun itself.

When asked if he had read "any literature that deals with the question whether you can tell the direction in which a firearm is pointed," the officer replied that he had not; his opinion that the gunshots were fired at him was based "solely on [his] past experience" from standing near those who were firing away from him, his "experience of being shot at," and his "numerous times of firing a weapon" himself. He could not exactly explain the distinction between the sounds of gunshots fired at him or fired in a different direction, but he was certain of his ability to distinguish them. In his words, shots fired at him sound more like "a cannon," and shots fired away from him sound more like fireworks. And the muzzle flash from the gun fired in his direction looked nothing like the muzzle flashes he has observed from close range on a monthly basis at the firing range (which are more elongated than round).

The trial court concluded that the officer "probably does have sufficient knowledge, expertise and training in terms of being able to describe muzzle flashes and when they are fired away from him and when they are fired toward him"; but the court was "reluctant to overemphasize [the officer's] expertise" such that the jurors might view him as "a more credible witness . . . because he has been designated as an expert." Thus, the court ruled that the officer could testify as a lay witness but tell

the jurors about his qualifications and experience concerning gunfire. Rejecting defense counsel's request to exclude it pursuant to Evidence Code section 352, the court found that the probative value of the opinion testimony outweighed any prejudice to defendant. The court later overruled defense counsel's objection that the officer's opinion testimony should be excluded pursuant to *People v. Kelly* (1976) 17 Cal.3d 24; the court explained: "[T]his is not the subject of a new scientific technique, nor is he testifying as an expert, but simply testifying as a percipient witness."

The jury thus heard about the officer's background and his observations regarding the sound of the shots and the shape of the muzzle flash (consistent with his testimony at the pretrial hearing), and how this led him to believe the gun was aimed at him during the three shots that were fired (even though none struck the patrol car or the officer). The defense again registered its objections to the testimony as expert opinion. After the officer testified to his observations and conclusion, the court instructed the jury: "[J]ust so it is clear to you, he has described certain education, training[,] and concerns in his life of hearing sounds, seeing muzzle flashes that cause him to come to the conclusions he has. Okay? [¶] He is entitled, according to this Court's ruling, to explain to you how his life experience plays into his understanding of whether the weapon was directed in his direction. [¶] It is for you to determine ultimately through the instructions what the facts are."

On cross-examination, the officer conceded he had not read any studies or received any training in the ability to discern the direction of a gunshot from the sounds and flashes, or heard anyone else attest to having this ability. He also testified he had not seen either the gun or defendant's hand.

A firearm expert, a former police officer and firefighter with 22 years of investigative experience and 40 years of firearm experience, testified for the defense that there were too many variables at play to be able to discern the direction of a gunshot from the shape of a muzzle flash. Thus, he disagreed that the officer's observations supported a conclusion that defendant aimed the gun at the officer.

During deliberations, the jury asked for a rereading of the officer's testimony and inquired whether he was an expert witness (and if he were, the area of his expertise). The trial court responded that the officer "testified as an expert witness only as it relates to the mechanical workings of firearms. [¶] He was testifying as a percipient witness as to the events he personally observed. [¶] As with all witnesses please refer also to instruction 226 for factors you may find helpful in evaluating a witness's testimony."

The jury ultimately convicted defendant of willfully and maliciously firing a gun at an occupied vehicle (the patrol car), as well as other charges against him.

B

Lay opinion testimony based on the personal observations of the witness is admissible if no particular scientific knowledge

is required or where it is necessary as a practical matter because the witness cannot otherwise articulate the subtle nuances of the observations. (*People v. Chapple* (2006) 138 Cal.App.4th 540, 547; Evid. Code, § 800; 2 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 2d ed. 1982) Expert and Lay Opinion Testimony, § 29.1, p. 976.)

Here, defendant argues the officer's familiarity with gunfire was beyond common experience and, thus, was beyond the limits of proper lay-opinion testimony. He suggests it was akin to an officer's impermissible use of a test for inebriation based on the involuntary eyeball movements of a suspect, a test which involved the assertion of a scientific legitimacy beyond common knowledge. (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1331-1333.) We disagree.

The CHP officer did not purport to be applying any sort of scientific expertise in reaching his conclusion that the gun was pointing at him when defendant fired it. To the contrary, both the CHP officer and the defense expert made it clear that there were no scientific bases for the officer's opinion. Rather, his opinion was based on his personal experience having been around guns fired at him and away from him. It was, as the trial court correctly concluded, a lay opinion that can be given by persons who share the officer's not uncommon experience and familiarity with gunfire. Thus, the court properly allowed this testimony.

II

Defendant was convicted of possessing methamphetamine while armed (count six; Health & Saf. Code, § 11370.1) and possessing

methamphetamine (count eight; Health & Saf. Code, § 11377). Both relate to the small quantity of the drug recovered after officers watched defendant discard it during their pursuit of him. The court stayed sentence on count eight.

Defendant contends, and the People concede, that the conviction on count eight cannot stand. Just as a person cannot be convicted of both possessing a controlled substance and possessing the same substance for sale (*People v. Oldham* (2000) 81 Cal.App.4th 1, 16; *People v. Magana* (1990) 218 Cal.App.3d 951, 954), one cannot possess a substance while armed without also possessing it. Therefore, the former offense includes all the elements of the latter offense (*People v. Birks* (1998) 19 Cal.4th 108, 117), and the conviction on count eight must be reversed.

III

Perhaps because a leap day was involved, the calculation of defendant's actual custody from his arrest on October 6, 2007, to his sentencing on March 7, 2008, was short one day--the trial court awarded only 153 days rather than 154. At the applicable rate of 15 percent (Pen. Code, § 2933.1), this is sufficient to entitle defendant to one more day of custody credit (23 days, as opposed to the 22 days as awarded by the trial court).

Thus, defendant correctly contends, and the People properly concede, that defendant is entitled to two more days of presentence credits.

DISPOSITION

Count eight is reversed, and the judgment is modified to award defendant one additional day of actual presentence custody

credit and one additional day of conduct credit. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect these modifications and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

SCOTLAND, P. J.

We concur:

BLEASE, J.

ROBIE, J.